

**Letter of Findings Number: 04-20130065**  
**Sales and Use Tax**  
**For the Periods 2009 through 2011**

Under IC § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

**ISSUE**

**I. Gross Retail Tax – Lottery Sales.**

**Authority:** IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-9-3; IC § 6-8.1-5-1; IC § 6-8.1-5-4; IC § 6-2.5-5-34

Taxpayer argues that it was not required to collect or remit sales tax on certain sales.

**STATEMENT OF FACTS**

Taxpayer is a business that operates a combined convenience store and gas station at its single location in Indiana. The Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer for the years 2009, 2010, and 2011.

Taxpayer sold fuel from metered pumps and also made retail sales from the convenience store, including typical items such as cigarettes and other tobacco products, sunglasses, lottery tickets, greeting cards, candy, gum, beer, and grocery items. The Department's audit revealed taxable sales on which no sales tax was collected. Taxpayer's books and records were deficient. The Department's audit resulted in the assessment of additional sales tax, penalty and interest based on the "best information available" to it. Taxpayer protested that the Department's audit did not deduct lottery sales from its taxable sales computation. Taxpayer did not protest the penalty. An administrative hearing was held on Taxpayer's protest and this Letter of Findings ensues. Additional facts will be presented as needed.

**I. Gross Retail Tax – Lottery Sales.**

**DISCUSSION**

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-3-2(a). A complementary excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. IC § 6-2.5-3-2.

In the case of a retail merchant – such as Taxpayer – the merchant is required to "collect the tax as agent for the state." IC § 6-2.5-2-1(b). The retail merchant "holds those taxes in trust for the state and is personally liable for the payment of those taxes . . . ." IC § 6-2.5-9-3.

It should be pointed out that, "Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for tax by reviewing those books and records." IC § 6-8.1-5-4(a). The records referred to in subsection (a) "include all source documents necessary to determine the tax, including invoices, register tapes, receipts, and cancelled checks." In addition, IC § 6-8.1-5-4(c) provides that, "A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times." When Taxpayer repeatedly failed to provide any documentation, the audit issued "proposed assessments" based upon the scanty information available.

The Department's authority to determine an estimated amount of taxable sales and assess additional sales tax is based upon IC § 6-8.1-5-1(b) which states that, "If the department reasonably believes that a person has not reported the proper amount of tax due the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department."

Taxpayer has the burden of demonstrating that the proposed assessment of sales tax was incorrect. IC § 6-8.1-5-1(c) in part states that, "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

In reviewing Taxpayer's scant records, the Department's auditor determined that Taxpayer's exempt percentages for store sales were significantly higher than the industry average of 7-15 percent. For all three of the audit years, Taxpayer's percentage was over 80 percent. Taxpayer could not provide documentation to substantiate what was considered exempt, and was given ample time to provide the records. Taxpayer declined an offer and opportunity from the auditor to request copies of source documents from Taxpayer's vendors. The Department's audit also found major discrepancies in Taxpayer's reporting of gasoline and diesel fuel sales and made assessments accordingly. Again, Taxpayer did not have adequate documentation and did not attempt to provide documentation even when provided the opportunity and time to do so.

Taxpayer protested one issue only. Taxpayer states in its letter protesting the assessment: "The reason for my protest is to include my lottery sales as tax exempt item on my sales tax return. I included the lottery sales as

part of sales and it needs to be deducted as exempt item on the sales tax return."

Subsequent to the hearing, Taxpayer provided documentation relating to online lottery sales as well as instant play games. An email dated May 23, 2013 from Taxpayer's POA that attaches some of the lottery sales documentation states that "The auditor did not account for these sales which are exempt from sales tax pursuant to [IC 6-2.5-5-34](#)."

However, the Department's audit states:

The audit was not provided adequate records to verify the taxpayer's exempt percentage of in-store sales.

The reported percentages, over 80[percent] each year, were too high. Based on the audit's unsuccessful attempt to schedule the taxpayer's purchases, the audit's impression from the store visit, and from prior audit experience, the audit is proposing an adjustment to the taxpayer's exempt percentage. **It is noted here that the taxpayer sells lottery tickets. Even taking lottery sales into account the audit feels the taxpayer's actual exempt percentage is 15[percent].**

**(Emphasis added).**

Taxpayer was unable to point out where the audit included lottery sales in its estimate of taxable sales. Furthermore, it appears that Taxpayer and the Department's auditor discussed lottery sales and Taxpayer provided some documentation during the audit. The audit's conclusion quoted above takes lottery sales into consideration.

Absent additional explanation or documentation, Taxpayer has not met its burden to show that the assessment is incorrect, as required by IC § 6-8.1-5-1(c).

#### **FINDING**

Taxpayer's protest is respectfully denied.

*Posted: 10/30/2013 by Legislative Services Agency*

An [html](#) version of this document.